Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

October Term 2001

UNITED STATES OF AMERICA, EX REL.
RICHARD MCALLAN,

Petitioner,

-against-

THE CITY OF NEW YORK, a Municipal Corporation,
and NEW YORK CITY HEALTH AND
HOSPITALS CORP.,
a Public Benefit Corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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67 pp

Questions Presented:

1. Can an alleged timeliness error on filing an Amended Notice of Appeal following the denial of a District Court Motion to Re-Argue be "severely" construed by the Second Circuit Court of Appeals to *completely extinguish* the Appellant's right to have the main appeal heard when a *timely* Notice of Appeal had been originally filed from the District Court's Judgment of Dismissal of the original False Claims lawsuit?

2. Can the Second Circuit refuse to accept appellate jurisdiction of the original and supplemental appeal when the time to appeal the denial of the Motion to Re-argue had *not* begun to run because the denial of the Motion to Re-argue had never been reduced to a separate Judgment and entered in accordance with FRCP Rule 58 and as required by applicable Second Circuit precedents?

3. Can the Second Circuit disregard the applicable U.S. Supreme Court precedent of *Smith v Barry,* 502 U.S. 244 (1992) and related Second Circuit precedents by failing to "liberally interpret" the Amended Notice of Appeal requirements and treat the Appellant's *timely* letter to District Judge Knapp reporting the District Court Clerk's docketing errors in this case as the functional equivalent of a timely filed Amended Notice of Appeal?

4. Can the Second Circuit Court of Appeals disregard the Second Circuit's established precedents and procedures for

removing a case from its active calendar pending resolution of a supplemental District Court Motion and further disregard its own Second Circuit Mandate that provided that the original appeal could be restored to the active calendar within thirty days of the disposition of the Motion to Re-argue in the District Court?

5. Should the Appellant be penalized with the dismissal of the *entire* appeal for lack of appellate jurisdiction in a decision described as "severe" by the Second Circuit Court of Appeals when subsequent investigation shows that the District Clerk never forwarded a physical copy of the denial of the Re-argument Motion to the Second Circuit or the Parties as required by the FRAP Rule 3 (d)(1) and that the respective District Court computer docketing systems in the Southern District do not automatically notify the Second Circuit Clerk as to the disposition of supplementary FRCP Rule 59 motions?

6. Should the "unique circumstances doctrine" be applied when a Court Attorney of the Second Circuit assigned to the appeal erroneously advised the parties that a timely filed Notice of Appeal was ineffective because of the supposed pendency of the Motion to Re-argue in the District Court that resulted in the Parties withdrawing the original appeal through stipulation in error and which erroneous withdrawal was approved by the Second Circuit Court of Appeals?

7. Should the Appellant be penalized with the dismissal of the entire Appeal when under the "unique circumstances doctrine" the Appellant complied with the written direction of

the U.S. District Judge who provided in a written order that the Appellant had thirty days to reinstate the appeal pursuant to a Second Circuit approved stipulation after the Appellant reported serious docketing errors to the Court?

PARTIES TO THE ACTION

All the parties to the action are listed in the caption. There are no other parties to the action.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On August 7, 2001, the Second Circuit Court of Appeals denied a Petition for Rehearing and Petition for Rehearing En Banc. [App., *infra,* 24a-25a] This Petition was filed following the April 19, 2001 Per *Curiam* decision of the Second Circuit Panel that the Second Circuit lacked jurisdiction over this appeal because of alleged appellate procedural errors on the Appellant's part following the denial of a Motion to Re-argue in this "Qui Tam" action at the District Court level. [App., *infra,* 1a-10a] this decision is reported at 248 f.3d 48. As a result of this improper procedural dismissal, the merits of the District Court Opinion dismissing this False Claims action on the grounds that Petitioner McAllan was not an "original source" of information under the False Claims Act were not reached. [App., *infra*, 11a-23a.] The Petitioner-Appellant applied for and was granted an extension to file this Petition for Certiorari up to and including January 4, 2002.

JURISDICTIONAL STATEMENT

Jurisdiction of this "Qui Tam" action was founded in the District Court based upon the "False Claims Act," 31 U.S.C. §§ 3729-3733. This "Qui Tam" action was originally filed under seal in the U.S. District Court for the Southern District of New York on May 11, 1998. The Federal Government declined to intervene and the Complaint was unsealed on October 6, 1998.

The Defendants then made a Motion to Dismiss this action and on May 9, 1999 Senior U.S. District Judge Whitman Knapp granted the Motion to Dismiss the Complaint after he ruled that McAllan was not an "original source" of information. This decision was reduced to Judgment and entered on May 13, 1999. A *timely* Notice of Appeal was filed on June 10, 1999.

The Appellant also filed a Motion to Re-argue in the District Court on May 27, 1999. This Motion to Re-argue was denied by Judge Knapp by Order on July 12, 1999 but this Order was *not* mailed to the parties in violation of FRCP Rule 77 (d). More importantly, the District Court Clerk failed to mail or forward a copy of the decision to the Clerk of the Second Circuit in violation of FRAP Rule 3(d)(1). The denial of the Motion to Re-argue was *never* reduced to separate judgment and entered in accordance with FRCP Rule 58 and applicable Second Circuit precedents. Hence, *no* seperate judgment was served by the Clerk that denied the Motion to Re-argue in accordance with FRCP Rule 77(d) and FRAP Rule 4(a)(7).

No notification of the entry of the Order denying the Motion to Re-argue was received by the parties before the personal discovery of these docketing errors by Appellant's Counsel in September 1999. The Second Circuit *never* received Notice of Entry of this denial of the Motion to Re-argue from the Southern District Clerk in violation of FRAP Rule 3(d)(1). The denial of this crucial supplementary District Court Motion does *not* appear on the Second Circuit Docket Sheet.

On July, 19, 1999, the Second Circuit Staff Counsel assigned to manage the appeal issued a Pre-Argument Order that stated in a footnote that the original appeal was "'ineffective' under FRAP 4(a)(4) because of timely filed post-judgment motion." The Staff Counsel *erroneously* believed that the Motion to Re-Argue had *not* been decided as of July 19th when in fact the Motion to Re-argue had already been denied. Staff Counsel also enclosed a form Stipulation to mark the appeal off the Circuit calendar without prejudice pending disposition of the Motion to Re-argue.

The Appellant's Counsel then *erroneously* entered into a Stipulation that the appeal could be restored to the calendar within 30 days of the disposition of the [already decided] Motion after being advised by the Second Circuit Staff Counsel that the Motion to Re-argue was still pending. This Second Circuit Mandate approving the "without prejudice" withdrawal of the Appeal was entered on August 16, 1999.

When the notification errors were personally discovered by Appellant's Counsel in September of 1999, Counsel immediately notified Judge Knapp of these errors by letter dated September 12, 1999. Judge Knapp credited the fact that the Parties had *not* received notification of the disposition of the Re-argument Motion. On September 15, 1999, Judge Knapp issued a Memorandum and Order re-instating the July 13th order so that the original marked-off appeal could be

reinstated within 30 days. This Order is set forth in its entirety:

> "This Court denied plaintiff's motion for reargument and to amend the complaint, and the Court's Memorandum and Order to that effect was docketed on July 13, 1999. According to Plaintiff's attorney, however, neither he nor opposing counsel received notice of that Memorandum and Order, neither from our chambers or from the Clerk of the Court.
>
> In fact, plaintiff filed an appeal from our original decision dismissing the complaint, and because counsel for both sides believed that no Order regarding the Motion to reargue had been rendered as of July 20, 1999, all parties entered into a Stipulation withdrawing the appeal without prejudice, to be restored within thirty days of docketing such Order.
>
> Plaintiff's counsel now applies, in a letter dated September 12, to re-issue our Order denying the motion to reargue so that the appeal can be re-instated within thirty days thereafter, in accordance with the Stipulation. Since we credit counsel's account concerning the non-delivery of the July 13 Order, we hereby re-instate such order as of this date."
> [SO ORDERED. September 15, 1999.]"
> {Entry Date: September 23, 1999.}

On October 14, 1999, an Amended Notice of Appeal was *hand delivered* to the Second Circuit requesting that the appeal be reinstated. The Amended Notice of Appeal recited both the original dismissal and the dismissal of the Motion to Re-argue. The appeal was reinstated on the docket on October 26, 1999.

This October 26, 1999 reinstatement date is *erroneously* reported as the filing date of "...McAllan's Notice of Appeal." [App., *infra,* 6a] The original Notice of Appeal, which was filed on June 10, 1999, is not treated at all in the decision although it is mentioned in the Second Circuit's "Backgound" section of the decision. [App., *infra,* 3a-4a]

At the March 8, 2001 oral argument of this appeal, Circuit Judge Calabresi raised the jurisdictional issue from the bench. Supplemental briefs were requested and filed by both sides. Ultimately the Second Circuit Panel applied a "severe" standard to this appeal and ruled in a *Per Curiam* decision on April 19, 2001, that McAllan had failed to re-open the appeal with the 14 days allowed by FRAP 4(a)(6), and then dismissed the *entire* appeal on jurisdictional grounds. A timely Petition for Rehearing and Rehearing En Banc was denied by the Second Circuit Court of Appeals on August 7, 2001.

Because of the World Trade Center Disaster, Appellant McAllan, who serves as a NYC EMS Paramedic, applied for an extension of time in which to file this Petition for Certiorari. This extension was granted until January 4, 2002. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

APPLICABLE LAWS AND FEDERAL RULES

The False Claims Act 31 U.S.C. §§ 3729-3733, formed the basis for jurisdiction of this case. Also applicable are Federal

Rules of Civil Procedure (FRCP) Rules 1, 58, 59, 77 and Federal Rules of Appellate Procedure (FRAP) 3 and 4.

The filing of the Motion to Re-argue was treated under Southern District of New York's Local Rule 6.3 as the equivalent of a FRCP Rule 59(e) Motion by the Second Circuit. [App., *infra,* 4a-5a]

STATEMENT

Appellant McAllan respectfully submits this Petition for Certiorari because of the technical dismissal of this appeal in manner that is *directly contrary* to the Federal Rules. The Second Circuit's application of what the Panel described as a "severe" jurisdictional standard in dismissing this appeal will have *significant national implications* for *all* Federal appellants. The technical dismissal of this appeal directly conflicts with the United States Supreme Court's "liberal" jurisdictional standard as set forth in *Smith v Barry,* 502 U.S. 244 (1992). In dismissing this appeal, the Second Circuit Court of Appeals created the exceptional circumstance of unilaterally *terminating* the appellate jurisdiction of a *timely filed* original Notice of Appeal.

a) Second Circuit Decision:

In fact, the instant decision *fails* to even mention the *original* Notice of Appeal in the discussion on the merits. Rather than base appellate jurisdiction on the original timely filed Notice of Appeal, the Panel focuses on an alleged failure to timely file a subsequent Amended Notice of Appeal following the discovery

of serious administrative errors committed by the Court Clerk. This alleged failure to timely file this Amended Notice of Appeal is then ruled to be fatal to the *entire* appeal, including the original judgment of dismissal which had been *timely* appealed earlier.

It is the Appellant's position that the original, timely filed Notice of Appeal, which was filed on June 10, 1999, following the entry of the *only* judgment in this case on May 13, 1999, *automatically* ripened to confer jurisdiction on the Court of Appeals in accordance with the 1993 Amendments to FRAP Rule 4(a)(4)(B)(i). The Second Circuit should have recognized this automatic transfer of appellate jurisdiction to the Second Circuit under the normal operation of the FRAP rules. As discussed herein, the various District Clerk docketing errors that resulted in an erroneous stipulation marking the appeal off the active calendar should *not* have been ruled to be jurisdictional in nature by the Second Circuit.

If the application of the Federal Rule of Appellate Procedure 4(a)(4)(B)(i) had been correctly applied in this case, the subsequent docketing errors would be treated as mere non-jurisdictional technical errors that could be remedied in the normal course of perfecting the appeal. But implicit in the Second Circuit's decision is a *repudiation* of FRAP Rule 4(a)(4)(B)(i) that an original, timely filed Notice of Appeal would be effective to automatically transfer jurisdiction to the Court of Appeals upon denial of a supplementary motion by the District Court. If this Second Circuit decision is allowed to stand, it will re-create an appellate "trap" for litigants and

attorneys alike that was supposed to be rectified by the 1993 Amendments to the FRAP.

Thus, the instant decision stands for the clearly unsupportable proposition that, without a *new* Notice of Appeal being filed following the disposition of a Rule 59 Motion at the District Court level, *all* appellate jurisdiction will be lost even if a *timely* filed original Notice of Appeal had been filed from the original judgment.

b) Nature of the Appeal Below:

This appeal sought to reverse Judge Knapp's ruling that McAllan was not an "original source" of information under the False Claims Act. The underlying case alleged that following a 1996 "merger" of the New York City Emergency Medical Service with the New York City Fire Department, that the City of New York and the NYC Health and Hospital's Corporation (HHC) were unlawfully billing the Medicare and Medicaid systems. The lawsuit alleged that NYC HHC was still billing ambulance services and NYC EMS capital expenditures under HHC's Taxpayer Identification Number and HHC's hospital bases formulas when HHC was *no longer licensed* to operate ambulances in the State of New York.

Following the U.S. Supreme Court's ruling in *Vermont Agency for Natural Resources v United States, ex rel.*, ___ U.S. ___, 120 S.Ct. 1858, (2000), which held that treble damages were "essentially punitive," the Appellant argued before the Second Circuit Court of Appeals that the Defendants were still liable

for "remedial" damages in this False Claims Action. The Appellant relied on the precedent of *United States v Halper*, 400 U.S. 435 (1989) for the proposition that the False Claims Act's damages provisions could be applied to local governments in a *remedial* fashion in order to avoid the constitutional problems of assessing "punitive damages" against a governmental unit. Unfortunately, this issue was not reached because of the procedural dismissal below.

Reasons For Granting The Petition

As outlined above, the instant decision re-creates an "appellate trap" that had supposedly been vanquished from the Federal Appellate Rules ten years ago. This re-created appellate "trap" takes on added significance when the Appellant's efforts to timely appeal this lawsuit are considered. Taken together, these efforts show a diligent effort to properly perfect the appeal of this lawsuit. These actions to perfect the appeal include: 1) the filing of an original, *timely* Notice of Appeal from the original dismissal of the action; 2) Counsel's discovery of these later docketing errors when he personally checked on the status of the Re-argument Motion: 3) the *immediate* reporting of the Clerk's errors to the District Court; 4) obtaining the Memorandum and Order of Judge Knapp reinstating his original Order denying the Motion to Re-argue so that the appeal could be reinstated; 5) timely filing an Amended Notice of Appeal as provided for in the Judge's Order; and 6) perfecting the actual appeal.

Such a technical dismissal also runs directly contrary to the

spirit of the Federal Rules and the seminal case of *Foman v. Davis*, 371 U.S. 178 (1962) in which this Court held:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1."

In this case, decided some thirty years before the 1993 Amendments to the FRAP, the US Supreme Court ruled that the record when taken together, clearly indicated the Appellant's desire to appeal the whole action and *rejected* the Circuit Court's narrow reading of the second Notice of Appeal in the Foman case.

I. The Decision Below Presents an Appellate Procedural Error Of Great Practical Importance That Only This Court Can Dispel:

a) The Second Circuit *Failed* to Give Efficacy to a Timely Filed Notice of Appeal to the Original Judgment Dismissing This False Claims Action.

As outlined herein, a *timely* Notice of Appeal was filed from

the May, 1999 judgment dismissing this case. This Notice of Appeal was filed during the pendency of a timely filed Motion to Re-argue before the District Court. Therefore, the instant appeal is properly governed by the provisions of FRAP Rule 4(a)(4)(B)(i) which states that:

> "If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of a motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or part, when the order disposing of the last such remaining motion is entered."

Moreover, the 1993 Advisory Committee notes on the amendment of FRAP 4 state the following:

> "The amendment provides that a notice of appeal filed before disposition of a posttrial tolling motion is *sufficient* to bring the underlying case, as well as any orders specified in the original motion, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and *not* a new notice of appeal." Page 355, *Federal Rules of Civil Procedure,* 2000-2001 Educational Edition, West Group, St Paul, Minn, 2000. [Emphasis Supplied.]

Despite this plain FRAP language and the supporting Amendment notes, the Second Circuit in effe[illegible] *repudiated* this

provision of the FRAP. In a decision described as having a "severe result" by the Appellate Panel, the Second Circuit interpreted the Federal Appellate Rules against the Appellant and issued a decision denying appellate jurisdiction *despite the fact* that a timely Notice of Appeal was filed after entry of the *only* judgment in this FCA appeal. To reach this instant decision, the Second Circuit simply *disregarded* the efficacy of the original June, 1999 Notice of Appeal.

This decision is therefore in direct conflict with the seminal U.S. Supreme Court case of *Smith v Barry,* 502 U.S. 244 (1992), which held that a "liberal" interpretation of Federal Appellate Rules 3 and 4 is preferred. In reaching the instant decision, the Second Circuit also overruled another post 1993 Second Circuit decision that has "liberally construed" the application of FRAP Rules 3 and 4 in deciding whether appellate jurisdiction exists. See, *Ametex Fabrics v Just In Materials, Inc.*, 140 F.3d 101, (2nd Cir. 1996).

> "This decision is therefore in direct conflict with the seminal U.S. Supreme Court case of *Smith v. Barry,* 502 U.S. 244 (1992(, which held that a "liberal" interpretation of Federal Appellate Rule 3 and 4 is preferred. In reaching the instant decision, the Second Circuit also overruled another post 1993 Second Circuit decision that has "liberally construed" the application of FRAP Rules 3 and 4 in deciding whether appellate jurisdiction existed following a motion for reconsideration. See, *Ametex Fabrics v. Just In Materials, Inc.*, 140 F.3d 101, (2nd Cir. 1996), at Pages 106-107. In the McAllan decision the Second Circuit

> *refused* to *recognize as efficacious* the original, timely Notice of Appeal filed while the Motion to Re-argue was pending before the District Court. As note herein, this original Notice of Appeal was filed within thirty days of the judgment dismissing the original FCA Action for want of federal jurisdiction. There is *no* mention in the instant decision that in 1993 Rule 4 of the FRAP was ***amended*** to allow a previously filed Notice of Appeal to become "effective" on the date of entry of the Order disposing of a Motion to Reargue."

The Second Circuit's heavy reliance on the holding found in *Endicott Johnson Corp. v Liberty Mutual Ins. Co.*, 116 F.3d 53, 55 (2nd Cir. 1997) {App., *infra*,6a-7a} ~~is~~ misplaced because there was a *timely* Notice of Appeal filed from the only Judgment in this instant case. [In *Endicott*, the *first* Notice of Appeal was filed four months after the Judgment was rendered in the case following the grant by the District Court of *several* extensions to file an appeal.] Therefore, in accordance with FRAP Rule 4(a)(4)(B)(i) jurisdiction of the judgment of dismissal of this FCA appeal *automatically* vested in the Court of Appeals as soon as the Reargument Motion was denied. See also, Footnote # 1, *Cooper v Town of East Hampton*, 83 F.3d 31 (2 Cir. 1996).

This FCA decision is also in conflict with the decisions of the 5th and 9th Circuit Court of Appeals that have ruled under the 1993 amendments to FRAP Rule 4 that a Notice of Appeal filed while a Motion to Amend a Judgment is pending is no longer a nullity but is merely held in abeyance until the Motion to Re-argue is resolved. See, *Leader National Insurance Co.*

v Industrial Indemnity Insurance Co., 19 F.3d 444 (9th Circuit, 1994) and *U.S. v One Hundred Twenty-four Thousand Eight Hundred and Thirteen Dollars ($124, 813) in U.S. Currency*, 53 F.3d 108, certiorari denied *Sivaskandan v U.S.*, 516 U.S. 1171.

b) The Second Circuit Disregarded the Second Circuit Rule That the Time to Appeal Runs From the *Entry of Judgment* Under FRCP Rule 58.

Federal Rule of Appellate Procedure Rule 4(a)(7) defines "entry" as:

> "A judgment or order is entered for purposes of Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

In order to avoid confusion as to when an appeal period starts to run, the applicable Second Circuit precedents follow the rule that an order of the District Court must be reduced to separate judgment in accordance with FRCP Rule 58 before an appeal period *ever* starts to run in a particular case. Since the Motion Denying Re-argument was *never* reduced to judgment and this error was never objected to by any party or the Second Circuit, the Amended Notice of Appeal filed on October 14, 1999 should have been treated as *timely filed* in all respects. See, *Bankers Trust v Mallis*, 435 U.S. 381, 387 (per curiam), reh'g denied 436 U.S. 915 (1978).

It is interesting to note that in *Boguslavsky v South Richmond Securities et al.*, 225 F.3d 127, (2nd Cir 2000) Second Circuit

Judge Calabresi served on a Second Circuit Panel that accepted an Appellate Brief as a "functional equivalent" of a Notice of Appeal when the Appellant had filed a Notice of Appeal from the *wrong* District Court order, citing *Smith v Barry, supra,* (at p. 248) as authority {at Footnote # 1}.

In sharp contrast to Boguslasky, here the Second Circuit, with Circuit Judge Calabresi also serving as a FCA Panel Member, *rejected* a timely Notice of Appeal from the *only* judgment entered in the FCA lawsuit. This inexplicable disregard of Second Circuit precedent is therefore at odds with *Selletti v Carey,* 173 F.3d 104, (2 Cir. 1999), which once again articulates the Second Circuit rule that the time for filing an appeal *never* begins to run if a *separate judgment* is *not* entered on the docket in accordance with FRCP Rule 58. Further support for this position is found in *Cooper v Salomon Brothers,* 1 F.3d 82 (2nd Cir. 1993), in which the Second Circuit accepted appellate jurisdiction even though no separate judgment had been entered by the Clerk.

c) The Appellant Filed A Letter/Motion That Indicated His Intention to Appeal With The District Court In A Timely Fashion, Thus Preserving His Supplementary Appeal Rights:

The Second Circuit decision also *failed* to treat the September 12, 1999 letter to Judge Knapp, which requested the re-opening of the appeal period due to the non-receipt of the July 12, 1999 Order denying Re-argument, as the "functional equivalent" of an Amended Notice of Appeal. This letter was *promptly* served on all Parties and clearly stated the Appellant's intention to re-notice the appeal once the docketing errors had been discovered

by the Appellant's Counsel. Thus this letter/motion more than suffices as the "functional equivalent" of an amended Notice of Appeal. Following Judge Knapp's Order allowing reinstatement of the Order denying re-argument to allow the appeal to be re-instated, the actual Amended Notice of Appeal was then *timely* filed on October 14, 1999 with the Second Circuit Clerk.

Even if a seven day "reopening" appeal period is applied in this situation, see, FRAP Rule 4(a)(6)(A), the Appellant again indicated his intention to appeal by a properly served letter *within* the seven-day period following the discovery of the Clerk's errors. [App., *infra,* 4a] This decision is therefore in conflict with the *Barry* decision, supra, which has spawned a number of cases in which the record has been analyzed for the "functional equivalent" of a timely Notice of Appeal. The *McAllan* decision therefore overrules at least one such Second Circuit case spawned by *Smith v Barry, supra,* in which the Second Circuit Panel ruled that a letter to the District Judge indicating that the Department "will appeal" when the Plaintiff's Motion for Attorney Fees was resolved, was sufficient as a "functional equivalent" of a timely Notice of Appeal. See, *Haugen v Nassau County DSS*, 171 F.3d 136 (2nd Cir. 1999). See also, *Listenbee v City of Milwaukee,* 976 F.2d 348 (7th Cir. 1992).

d) The Appeal Of The Original Judgment Of Dismissal Should Have Been Heard By The Second Circuit Even If Supplementary Jurisdiction Was Found to be Lacking:

In terminating *all* appeal rights under even the *original* timely Notice of Appeal, this Second Circuit Panel has implicitly ruled that a procedural error on an appeal of a supplementary motion will *destroy jurisdiction* of a timely filed appeal of the main case. The Appellant is unable to locate *any* post 1993 decision where an Appellate Panel has failed to give a *timely* filed Notice of Appeal original jurisdiction even where supplementary appellate jurisdiction was found wanting.

Under this FCA decision, this withdrawal "without prejudice" Mandate has in effect been treated as a *voluntary dismissal* of the original appeal by the Second Circuit. This decision is therefore in open conflict with *Smith v Barry, supra,* and at least five Second Circuit precedents regarding the issuance and efficacy of remission mandates.

In fact, in order to the resolve just such jurisdictional questions over remission back to the District Court, the Second Circuit ruled in *USA v Jacobsen,* 15 F.3d 19 (2nd Cir. 1994) that the "better practice" in the Second Circuit would be for a mandate to issue when a case was transferred back to the District Court. "However, we believe that the better practice in such cases is to direct that the mandate issue forthwith and that the mandate state the conditions that will restore jurisdiction to this [Second Circuit] Court." At page 22.

Moreover, this Second Circuit decision has now overruled *USA v Hernandez,* 5 F.3d 628, (2nd Cir. 1993). In the *Hernandez* case, which is *identical* to the instant situation, the Appellant withdrew his appeal of a conviction "without prejudice" to the

consideration of a Supplementary Motion at the District Court level. When that motion was rejected, the Court of Appeals restored jurisdiction of the withdrawn appeal when the Appellant complied with the instructions contained in the Mandate for restoring the original appeal. See, *USA v Hernandez,* at p. 631. It is interesting to note that the Panel afforded Mr. Hernandez the consideration of the original restored appeal even though he failed to file an appeal of the denial of the supplementary motion.

In *USA v Hilda Amiel, et al.,* 995 F.2d 367 (2nd Cir 1993) the Second Circuit allowed withdrawal of the appeal of a civil forfeiture action "without prejudice" to reinstate the appeal in writing within thirty days once the lower court acted on the motion seeking dismissal of an indictment. It is important to note that the stipulation entered into with the government and approved by the Second Circuit was the *identical* procedure followed in the McAllan appeal. See also, *USA v Salameh,* 84 F.3d 47, (2nd Cir. 1996) which held that the 2nd Circuit retains power to withdraw the Mandate and restore jurisdiction to the Court of Appeals; and *Warner v Orange County Dept. of Probation,* 115 F.3d 1068 (2nd Cir. 1997), which returned jurisdiction to the District Court for further action but provided for restoration to the original panel following the filing of a letter to restore the appeal or the filing of a Notice of Appeal if the judgment was amended below.

Given the above precedents, this ruling, if allowed to stand, calls into serious question the policy of the Second Circuit that the Appellate Court *maintains* ultimate jurisdiction of the

appeal once appellate jurisdiction has been timely obtained."If this McAllan decision is not overruled by the U.S. Supreme Court, the instant decision will only serve to again introduce unnecessary confusion into appellate practice in the Federal Courts.

e) In Light Of The Clerk's Docketing Errors, the Second Circuit Panel Should Have Restored Jurisdiction Of The Appeal By Merely Withdrawing The Erroneous Mandate:

As outlined above, the parties entered into a Stipulation withdrawing the appeal "without prejudice" in July of 1999 because the parties and the Second Circuit Staff Counsel erroneously believed that the Motion to Re-Argue had not yet been decided. The Appellant complied in good faith with the terms of the Second Circuit Mandate, dated August 4, 1999, that erroneously transferred jurisdiction of this appeal back to the District Court pending the outcome of a Motion to Reargue. It was not until September 9, 1999 that the Appellant's Counsel discovered that the Motion to Reargue had in fact already been denied by Order dated July 12, 1999 but never reduced to judgment and/or docketed in the Second Circuit's computers. [App., *infra,* 4a]

Investigation now reveals that the Second Circuit computers do *not* synchronize with the District Clerk's computer entries in S.D.N.Y. as to the disposition of Supplementary Motions. As a result, in this administratively compromised situation, a phone call placed to the Staff Attorney of the Second Circuit

would yield *inaccurate* docketing information as to the disposition of a crucial supplementary motion.

Worse, the District Clerk *never* sent a physical copy of the Order denying Re-argument to the Second Circuit because the disposition of the Re-argument Motion does not show on the Second Circuit Docket sheet. This failure to transmit updated docket entries is a violation of FRAP Rule 3(d) and Second Circuit Local Rule 3(d). FRAP Rule 3(d) provides in pertinent part:

> "The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed."

A careful examination of the District Court docket sheet in this appeal reveals some of the administrative errors that led to this unusual situation. The key district court docket sheet entry is the July 12, 1999 entry that states:

> "MEMORANDUM AND ORDER, denying [20-1] motion for reconsideration of [19-1] judgment order purs (sic) to Local Civil Rule 6.3, and denying [20-2] motion for leave to file an amended complaint pursuant to rule 15(a) of the FRCP. (signed by Judge Whitman Knapp]; Copies mailed. (kw)" {A-4-5} [Entry Date 07/13/99]

By operation of the FRAP Rule 3(d), the clerks of the Second Circuit should have been "promptly" notified that the Motion

to Reconsider was denied by the District Court. There is no indication in the docket sheet that such a "prompt" transmittal was in fact made to the Court of Appeals. Rather, as stated in my letter to the Second Circuit dated July 28, 1999, a stipulation withdrawing the appeal without prejudice had been entered into between the parties because all parties believed the Motion to Reconsider to still be active before Judge Knapp. [1] As further stated in this letter, this stipulation of withdrawal was entered into because Mr. Jack Baer of the Second Circuit wanted to conference the appeal on August 4, 1999. On August 16, 1999, the USCA issued a mandate withdrawing the appeal without prejudice. Consequently, the District Clerk's failure to promptly transmit the updated docket entries resulted in the appeal being *erroneously* stipulated off the appellate calendar by the respective parties and the Second Circuit Court of Appeals.

Further compounding this docketing error, the notice of entry was *never* received by the parties regarding the July 12th Order of Judge Knapp. It is interesting to note that immediately below that entry [#26] is an entry [#28] regarding a Memo-Endorsement of a Reargument scheduling letter dated June 10, 1999 that was prepared by Appellant's Counsel. The August

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[1] This letter was an attachment to my September 12, 1999 letter to Judge Knapp requesting redocketing of this appeal so that it could restored to the appellate calendar. Apparently this letter to Judge Knapp was *never* docketed in the District Court. The Appellant's Motion to correct the record by stipulation between the parties pursuant to FRAP 10(2)(A) was granted by the Second Circuit on March 26, 2001.

16, 1999 entry date of this letter is over two months *after* the June 10, 1999 date of the original letter from Appellant's Counsel. Following that entry is an out-of-order entry for item #27 that is the August 16th Mandate of the Second Circuit withdrawing the appeal. Given this docket irregularities, the Second Circuit should *not* have relied on the supposed entry of Judge Knapp's Order denying the Motion to Re-argue on July 13, 1999.

As noted herein, my September 12, 1999 letter to Judge Knapp requesting the redocketing of this appeal was apparently *never* docketed by the District Clerks at all. Given these docket irregularities significant irregularities in the docket sheet, it would thus appear that there were serious administrative errors in both posting and/or mailing the denial of the Motion to Re-argue that was supposedly docketed with the Clerk on July 13, 1999.

Because of the District Clerks' administrative errors referred to above, all parties, as well as the Second Circuit personnel, mistakenly *believed* that the Motion for Reconsideration was still active before Judge Knapp when this Withdrawal Stipulation was erroneously entered into. If the docket computer had properly reflected the fact that the Motion to Reargue had already been denied by Judge Knapp, certainly the Second Circuit's Staff Counsel would have provided the parties with the accurate information that the Motion to Re-argue had been denied. At that point, all that would have been required was a simple amendment the already filed June 10th Notice of Appeal to reflect the denial of the supplementary motion so that

the case conference on this appeal could go forward. {FRAP 4(a)(4)(B)(ii)} Clearly there would have been *no need* for a Withdrawal Stipulation of any kind because the June 10th Appeal Notice had *automatically* ripened upon the District Court's denial of the only Rule 59 Motion pending in the case. {FRAP 4(a)(4)(B)(i)}

Despite these significant clerical errors, and the Appellant's good faith reliance on inaccurate computer entries in the Second Circuit's computers, the FCA Panel ignored the legitimacy of the Second Circuit Mandate and fully charged the clerk's errors against the Appellant in *denying* the jurisdiction of both the original appeal and the supplementary appeal of the Motion to Reargue. [App., *infra,* 7a] If the McAllan decision is allowed to stand, it will likely signal the end of the "liberal" interpretation of the Appellate Rules as provided for in *Smith v Barry, supra.*

f) Because the District and Appellate Courts Operate Two Different Docketing Computers That Are *Not* Synchronized, The "Unique Circumstances" Doctrine Should Be Applied In This Case To The Erroneous Withdrawal Of The Appeal:

As outlined above, the Second Circuit Panel also rejected the "unique circumstances" doctrine in affording appellate jurisdiction even after a Second Circuit Staff Counsel had a stipulation "so ordered" in the form of a mandate by the Second Circuit Court of Appeals. [App., *infra,* 9a] This mandate gave the parties thirty days in which to restore jurisdiction of the original appeal to the Second Circuit pursuant to stipulation between the parties. This mandate was issued after the parties and the clerks relied on the *inaccurate* docket entries of the Second Circuit computers, which recent investigation shows are *not synchronized* with the Southern District Court computers. Because of this lack of computer synchronization, the Second Circuit's docketing computers were *not* automatically updated to the fact that a Rule 59 Supplementary Motion had been disposed of at the District Court level.

In the Appellant's view, the jurisdiction of this appeal should *not* depend on which Court representative answers the phone at Federal Court. Certainly all parties were acting in a reasonable manner when they relied on what they *believed* to accurate docket information from a Second Circuit Staff Attorney. The Staff Attorney was officially relaying what he *believed* to be accurate docket information when he advised the Appellant to

withdraw the "ineffective" appeal pending resolution of what all parties then thought to be a still outstanding supplementary Motion. And while the Appellant would certainly agree that the Second Circuit Staff Attorney is not there to give legal advice to Appellants, here the withdrawal error occurred because the Staff Attorney did not possess *accurate* docket information in the Second Circuit Court of Appeals' files. And while this comedy of errors may be viewed as somewhat extraordinary, the appellate problems caused by the docketing errors of non-synchronized Court computers are sure to re-occur in the future with negative consequences for future Appellants.

It was certainly the belief of the Second Circuit Staff and the respective parties that the efforts made to properly restore the appeal to the calendar in 1999 had been effective until the day of the argument before the Second Circuit Panel in March of 2001. Despite the bureaucratic morass that was subsequently uncovered [and briefed] when jurisdiction was questioned from the bench, the Second Circuit still refused to "liberally" interpret FRAP Rules 3 and 4 in favor of accepting jurisdiction of the appeal. *Smith v Barry*, *supra.* [App., *infra,* 9a-10a]

Certainly the faulty docket entries herein, and the errors the faulty docket subsequently caused, indicate the existence of a "unique circumstance" as it relates to the growing computerization of Federal Court records. The only docket computerization case so far decided by the Circuit Courts is that of *Hollins v Department of Corrections,* 191 F.3d 1324 (11 Cir. 1999), where the 11th Circuit Court allowed an appeal filed fourteen months late to proceed under the "unique circumstances" doctrine because counsel relied on inaccurate

computerized docketing entries in the PACER computerized docketing system.

As far as the Appellant can ascertain, this docket computerization issue would be a case of first impression for the United States Supreme Court. However, in view of the mischief the computer has already wrought in this appeal, the Appellant respectfully urges the Supreme Court to grant this Petition so that it may create *national* standards for docket computerization and the Clerks' responsibility for same in the future.

g) The Second Circuit Should Have Accepted Jurisdiction Of This Appeal Under The "Unique Circumstances Doctrine" Because The Appellant Relied On The Written Order Of A Federal Judge:

The Second Circuit decision does set forth the timeline regarding the discovery of the docketing errors by my associate in the "Background" section of the opinion. This decision also states that Judge Knapp "re-issued" his July 12, 1999 Order denying the Motion to Re-argue so that the appeal could be re-instated. [App., *infra,* 3a] However, Judge Knapp explicitly recognized in his decision that the Appellant *had* filed a timely Notice of Appeal from his original May 1999 decision. Judge Knapp then states that the parties entered into a "...Stipulation withdrawing the appeal 'without prejudice' to be restored within thirty days of docketing such Order." [Petition, at pp 3-4]

As already set forth above, if the Second Circuit had merely considered the prompt report of the docketing errors to the Federal Judge to be the "functional equivalent" of a timely Amended Notice of Appeal, this Petition for Certiorari would be unnecessary. *Smith v Barry, supra.* FRAP 4(a)(6)(A) Certainly the Record shows that Appellant's Counsel made his intentions to appeal the dismissal of this lawsuit and the denial of the supplemental Motion quite clear throughout the litigation. In his Order and Memorandum, Judge Knapp explicitly recognized the Appellant's intention to appeal and "credited" the fact that no notification of the entry of the denial of supplementary Motion had been received. After examining the stipulation that *"withdrew" the appeal without prejudice at the Second Circuit level*, Judge Knapp issued a corrective order that authorized "reinstatement" of the appeal in accordance with the terms of the stipulation that had already been *approved* by the Second Circuit Court of Appeals.

Therefore, even if we assume for the sake of argument that none of the other legal issues in this Petition would carry the day, the Appellant nonetheless relied on the *written* decision of the Federal Judge that authorized the reinstatement of the appeal. The Appellant further points out that that *no* stipulation was ever entered into that purported to "toll" the appellate deadlines as is erroneously stated in the Second Circuit decision. [App., *infra,* 8a-9a] Rather Judge Knapp properly recognized the fact that the parties had marked the appeal off the calendar at the Second Circuit level in error and *independently* wrote an order designed to correct these mistakes.

By rejecting the "unique circumstances" doctrine in this decision, the Second Circuit decision is now in conflict with a number of U.S. Supreme Court and Appellate precedents that will afford jurisdiction where a written order of a Federal Judge was relied upon by the Appellant in missing a deadline. See, e.g., *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 179 (1989) and *Moore v South Carolina Labor Board, et al.,* 100 F.3d 162, (D.C. Cir. 1996).

II. The Incorrect Decision Below Will Re-Create Appellate Traps for Litigants In The Future If It Is Allowed To Stand.

The Appellant has already set forth at length the reasons as to why we believe the Second Circuit decision to be in serious error. Taken by themselves, these compounded Court of Appeals errors certainly argue strongly for a grant of the Writ of Certiorari.

But far more compelling is the fact that this published decision turns back the clock and re-creates appellate traps for both unwary litigants and attorneys in the future. There is simply no reason for the Second Circuit Court of Appeals or the parties appearing before it to wish to return to the pre-1993 appellate situation.

When the errors herein are considered in light of the docket problems and computerization difficulties below, this case squarely presents the opportunity for the US Supreme Court to rule in an area where it has never ruled before. For the reasons

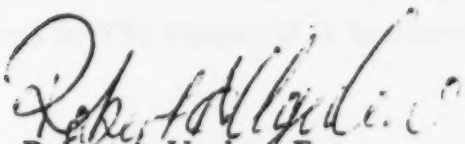
outlined herein, the Appellant respectfully urges the US Supreme Court to grant this Petition for a Writ of Certiorari.

CONCLUSION:

This Petition for a Writ of Certiorari should be granted.

Dated: January 4, 2002
Brooklyn, N.Y.

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-6150 – August Term, 2000

(Argued: March 8, 2001 Decided: April 19, 2001)

----------x

UNITED STATES OF AMERICA, *EX REL.*
RICHARD MCALLAN,
Plaintiff-Appellant,

-v-

THE CITY OF NEW YORK, a Municipal Corporation,
and NEW YORK
CITY HEALTH AND HOSPITALS CORP.,
a Public Benefit Corporation,
Defendant-Appellees.

----------x

Before: JACOBS, CALABRESI, *Circuit Judges,*
ARTERTON, *District Judge.*[1]

Plaintiff Richard McAllan appeals from the dismissal of his qui tam action, 31 U.S.C. § 3729 *et seq.*, and the judgment entered by the United States District Court for the Southern District of New York (Knapp, J.). At oral argument, we raised the issue of the timeliness of this appeal *nostra*

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[1] The Honorable Janet Bond Arterton, United States District Judge for the District of Connecticut, sitting by designation.

sponte, and requested letter briefing on the Court's jurisdiction, which has been received and considered. For the following reasons, we conclude that the Court lacks jurisdiction over this appeal as untimely, and accordingly the appeal is DISMISSED.

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(Larry A. Sonnenshein
Mordecai Newman on the brief)
For Defendant-Appellee
City of New York

Per Curiam

Background

On May 4, 1999, the district court granted defendants' motion to dismiss, ruling that the alleged violations of the False Claims Act reported by plaintiff to the government had been previously publicly disclosed, and the district court therefore lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A). Judgment was entered by the Clerk on May 12, 1999. On May 27, 1999, McAllan filed a motion for reargument and for leave to file an amended complaint.[2] McAllan also filed a timely Notice of Appeal under Fed. R. App. P. 3(a)(1) on June 10, 1999, within 30 days after the judgment entered on May 12, 1999. On July 12, 1999, Judge Knapp denied McAllan's motion. While the court docket sheet reflects that copies of the ruling were mailed to the parties, *see* Docket Entry # 26 "Copies mailed.", copies apparently never reached the parties, nor was a copy forwarded to the clerk of the Second Circuit Court of Appeals as required by Fed. R. App. P. 3(d). Because of their lack of awareness that the pending motion had been decided, on July 20, 1999 the parties stipulated to a withdrawal of the appeal without prejudice to renew within 30 days of entry of an order disposing of the motion, pursuant to Fed. R. App. P. 4(a)(4),[3] which was "So

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[2] This motion was filed pursuant to Southern District of New York Local Rule 6.3, which provides in relevant part that "A notice of motion for reconsideration or reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked."

[3] "If a party files a notice of appeal after the court announces or enters a judgment -- but before it disposes of any motion listed in Rule

Ordered" by the clerk of the Second Circuit Court of Appeals on August 4, 1999. It is clear that appellant would have had no reason to withdraw his appeal had either party been aware that Judge Knapp had already ruled. There is no indication, however, that the district court's ruling was not promptly entered on the court docket sheet.

According to appellant's post-argument letter brief and attachments thereto, on September 9, 1999, appellant's counsel "dispatched an associate" to the office of the Clerk of the District Court for the Southern District of New York to ascertain the status of the motion for reconsideration, thereafter learning that McAllan's motion had been denied approximately two months previously. McAllan's counsel informed Judge Knapp by letter, stamped "Received" on September 14, 1999, of his belated notice of the ruling, requesting that the decision on the motion for reargument be re-issued in order to allow reinstatement of the appeal. By order dated September 15, 1999 and file-stamped September 21, 1999, Judge Knapp acceded to the request, noting that "[p]laintiff's counsel now applies, in a letter dated September 12, to re-issue our Order denying the motion to reargue so that appeal can be re-instated within thirty days thereafter, in accordance with the Stipulation. Since we credit counsel's account concerning the non-delivery of the July 13 Order, we hereby re-instate such Order as of today's date." The docket sheet states that McAllan's appeal was "re-instated" on October 26, 1999.

DISCUSSION

4(a)(4)(A) -- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered."

The Fed. R. App. P. 4 time requirements for taking an appeal have been treated as especially rigid, and a federal court's authority to extend or suspend those limits is narrowly limited. *See, e.g., In re Orbitec Corp.*, 520 F.2d 358, 362 (2d Cir. 1975) ("Courts should sanction deviations from the letter of the Rules only on the most compelling showing that [the] purposes [of these rules] are served."); *Mendes Junior International Company v. Banco Do Brasil, S.A.*, 215 F.3d 306, 312 (2d Cir. 2000) ("The power of the federal courts to extend the time limits on the invocation of appellate jurisdiction is severely circumscribed."). The requirement of Fed. R. App. P. 4(a)(1), that a notice of appeal be filed "within 30 days after the judgment or order appealed from is entered," is "mandatory and jurisdictional." *Endicott Johnson Corp. v. Liberty Mutual Ins. Co.*, 116 F.3d 53, 55 (2d Cir. 1997) *(quoting Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)). This 30 day period is tolled until entry of an order disposing of the last of certain post-judgment motions, including motions for judgment as a matter of law under Fed. R. Civ. P. 50(b), to amend or make additional factual findings under Fed. R. Civ. P. 52(b), for attorneys' fees, to alter or amend the judgment under Fed. R. Civ. P. 59, for a new trial under Fed. R. Civ. P. 59, or for relief under Fed. R. Civ. P. 60. *See* Fed. R. App. P. 4(a)(4)(A). Although a motion for re-argument under Local Rule 6.3 "is not one of those that, under FRAP Rule 4(a)(4)(A), postpones the deadline for appeal," *Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397, 403-4 (2d Cir. 2000), a postjudgment motion requesting alteration or amendment of the judgment but denominated as something other than a motion under Rule 59 "is generally treated as having been made under Rule 59(e), thereby extending the time to appeal, if the motion was filed within the 10-day period allowed for a Rule 59(e) motion." *Id.* at 401; *see also City of*

Hartford v. Chase, 942 F.2d 130, 133-34 (2d Cir. 1991) ("Motions for reconsideration under [D. Conn. Local Rule] 9(e) . . . are as a practical matter the same thing as motions for amendment of judgment under Fed.R.Civ.P. 59(e) -- each seeks to reopen a district court's decision on the theory that the court made mistaken findings in the first instance. As such, for purposes of Rule 4(a)(4), we believe that a motion under local rule 9(e) must be treated the same as a motion under Rule 59.").

Construing McAllan's Rule 6.3 motion for reconsideration as a Rule 59(e) motion, and assuming it was timely filed within the ten day period for such motions, his notice of appeal was required to have been filed within 30 days after the district court's Order denying that motion, i.e. by August 12, 1999. Even allowing for the sole thirty-day extension of time permitted by Fed. R. App. P. 4(a)(5), any appeal of Judge Knapp's ruling denying the motion for reconsideration was due no later than September 13, 1999. McAllan's notice of appeal filed October 26, 1999 was plainly untimely, depriving this Court of jurisdiction absent "unique circumstances." *Thompson v. INS*, 375 U.S. 384, 387 (1964) (per curiam).

In essence, appellant's solution to his late discovery of the deadline-triggering order sought to expand appellate jurisdiction by asking the district court to re-write history and "re-issue" his order from which a "timely" appeal could then be taken. New jurisdictional life cannot be breathed into an appeal whose filing time has already expired, unless unique circumstances so require. *See Mendes Junior Internat'l*, 215 F.3d at 311 ("[W]e do not interpret the rules of procedure as allowing the court to revive a losing party's right to appeal after

both the original appeal period and the permissible grace period have expired . . . .").

Fed. R. App. P. 4(a)(6) permits a district court to "re-open" the time to file an appeal for a period of 14 days if:

> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

This provision precisely addresses McAllan's situation. Thus, construing McAllan's letter to the District Court as a motion under Rule 4(a)(6), his notice of appeal, to be timely, had to be filed within 14 days of Judge Knapp's Order "re-issuing" his previous order. Instead, McAllan and defendants-appellees operated under the mistaken assumption that the 30-day time period provided for in their Stipulation extended the time for appeal. However, the district court has no equitable powers to alter appellate timelines, and the fact that the parties agreed so to expand the time to appeal cannot serve to confer jurisdiction on this Court. *See Endicott*, 116 F.3d at 57 (finding appeal untimely despite fact that district court had granted four extensions of the time to appeal in order to facilitate settlement and both parties had consented to extension; rejecting contention that district court had "inherent powers to control

proceedings before it and to enter stays in the interest of equity"). Moreover, appellant's failure to file a timely notice of appeal is not excused by what he characterizes as the "serious administrative errors" and docketing irregularities of the Southern District's clerk's office, because parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders they wish to appeal. *See In re OPM Leasing Serv.*, 769 F.2d 911, 916 (2d Cir. 1985) (district court's denial of motion for extension of time to appeal not an abuse of discretion, where parties did not receive copies of ruling and did not anticipate that district judge would rule as quickly as he did, because "[c]ounsel should not be encouraged to neglect their duty to monitor the docket on the basis of speculation as to the probable date of decision"); *see also Bortugno v. Metro-North Commuter RR*, 905 F.2d 674, 676 (2d Cir. 1990) (failure of court clerk to send notice of entry of judgment does not render counsel's failure to learn of entry "excusable neglect" within meaning of Fed. R. App. P. 4(a)(5) such that extension of time in which to file notice of appeal is justified).

Appellant's reliance on the "unique circumstances" doctrine recognized in *Thompson* to excuse the untimely filing of his appeal is unavailing, because the District Court gave no assurances to McAllan that his strategy would toll the appellate deadlines; it merely acceded to McAllan's request without independent consideration of its efficacy. The Supreme Court has held that the doctrine applies only to situations "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). As we have previously held, "[t]he fact that the court simply signed orders presented to it, purporting to grant

the parties' joint requests for relief, does not constitute 'unique circumstances.'" *Endicott*, 116 F.3d at 57. Nor can the "So Ordered" entry by the clerk of the Court of Appeals on the parties' Stipulation constitute a specific judicial assurance that the Stipulation could achieve its stated objective. Although Fed. R. App. P. 3(d)(1) requires the district clerks to send subsequent docket entries, including the Order denying reconsideration, to the "clerk of the court of appeals named in the notice," this Rule does not impose an obligation on the clerk's office to monitor the docket sheet and highlight for the parties the wisdom, or lack thereof, of a particular filing. Further, there is no indication that the clerk failed to docket Judge Knapp's order correctly, or timely enter it into the computerized docketing system. *See, e.g., Hollins v. Department of Corrections*, 191 F.3d 1324, 1328 (11th Cir. 1999) ("unique circumstances" excused petitioner's failure to timely file appeal, where counsel relied on district court's electronic records system which failed to show that final order had been entered). The "unique circumstances" doctrine simply is not applicable to the facts of this appeal, and accordingly cannot confer jurisdiction that otherwise would not exist.

We are mindful of the severity of this result, but as the Supreme Court has observed, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101 (1985). Moreover, as earlier discussed, Rule 4(a)(6) does provide a remedy for parties finding themselves in what McAllan describes as his "administratively compromised situation." As the facts surrounding the filing of McAllan's appeal do not fit within the narrow confines of the "unique

circumstances" exception, and McAllan did not proceed under the time frame provided by Fed. R. App. P. 4(a)(6), his October 26, 1999 notice of appeal is untimely, depriving this Court of jurisdiction to hear his appeal.

Conclusion

We have considered appellant's other arguments in support of appellate jurisdiction, and find they are without merit. For the reasons set forth above, we dismiss the appeal for lack of jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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98 Civ. 3349 (WK)

UNITED STATES OF AMERICA ex rel.
RICHARD J. McALLAN,

Plaintiff,

- against -

THE CITY OF NEW YORK, a Municipal Corporation; and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, a Public Benefit Corporation,

Defendants.

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MEMORANDUM & ORDER
WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Plaintiff Richard J. McAllan brings this qui tam action under the False Claims Act, 31 U.S.C. §§ 3729, *et* seq., as a relator on behalf of the United States of America. Plaintiff alleges that defendants submitted false claims for emergency ambulance services after the March 17, 1996 transfer of operating functions of the Emergency Medical Service ("EMS") from the New York City Health and Hospitals Corporation ("HHC") to the New York City Fire Department ("fire department" or "FDNY"). Before us is defendants' motion to

dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1).

PROCEDURAL HISTORY

The following procedural history, as well as the factual background, infra, are taken from defendants' brief in support of their motion to dismiss.

Pursuant to § 3730(b)(2) of the False Claims Act, the complaint, dated May 5, 1998, was filed in camera and served on the United States Attorney for the Southern District of New York. By Notice of Election to Decline Intervention filed under seal on September 14, 1998, the United States determined that it would not, at that time, take part in this action.

This is plaintiffs second lawsuit relating to the March 17, 1996 EMS transfer. Plaintiff first challenged the validity of the EMS transfer and the fire department's authority to operate an emergency ambulance service in state supreme court. See *McAllan et al. v. Marcos, et* al.. Index No. 104767/96 (Sup. Ct. N.Y. Co.). By decision dated November 20, 1997, that case was dismissed on the grounds that the transfer of EMS functions was valid under relevant state law. An appeal of that dismissal is pending and oral argument before the First Department is set for next month.

FACTUAL BACKGROUND

Plaintiff is a senior paramedic and employee of HHC as well as a member of the New York City Regional Emergency Medical Services Council. Defendant City of New York is a municipal corporation organized under the laws of the State ofNew York. Defendant HHC is a public benefit corporation created by the New York State Legislature in 1969. HHC

operates New York City's eleven acute care municipal hospitals in addition to other related facilities. As of March 17, 1996, operating functions of HHC's EMS were transferred from HHC to the fire department. HHC is reimbursed for health care services that it provides to aged and disabled persons under the Federal Medicare Program and to persons eligible for medical assistance under the Medicaid Act, the New York Public Health Law, the New York Social Services Law, and the New York State Plan for Medical Assistance.

In April 1995, New York's mayor proposed the transfer of EMS functions to the fire department in his Fiscal Year 1996 Executive Budget. In the months thereafter, the proposal was debated among representatives of the City, EMS, the unions representing EMS employees, and, beginning in September 1995, members of the City Council. In October 1995, the fire department issued a formal report which proposed the transfer of EMS functions as a means of improving response times to medical emergencies.

On October 26, 1995, the HHC Board of Directors authorized HHC's president to negotiate, on the agency's behalf, an agreement with the City for the transfer. Pursuant to that authorization, representatives of HHC and the City negotiated the terms and conditions of the transfer, including arrangements for the receipt of Medicaid and other funding as well as the billing and collection of charges for EMS services. By November 17, 1995, a Memorandum of Understanding containing the terms of the agreement had been drafted.

On November 30, representatives of the City met with representatives of the Governor in Albany in order to ensure the continuation of Medicaid funding for EMS services after the transfer. Upon achieving that goal, on January 19, 1996 the

City and HHC executed the final Memorandum of Understanding which set forth the details of the proposed transfer. On February 15, 1996, the City Council approved a bill which amended the City Charter to make explicit the fire department's authority to provide ambulance and EMS services. That bill was signed into law by Mayor Giuliani on February 26. On that same day, the mayor issued an executive order which directed the fire department, as of March 17, 1996, to assume ambulance and pre-hospital emergency medical service functions, consistent with the terms of the final Memorandum of Understanding between the City and HHC.

Pursuant to Article 30 of the New York Public Health Law, an ambulance service certificate must be obtained from the New York State Department of Health ("DOH") before an ambulance service can be operated in New York State. After the City cleared the applicable regulatory hurdles, on March 12, 1996 DOH conveyed to the fire department an Ambulance Service Certificate authorizing the fire department to operate such a service in New York City. DOH also approved the continuation of Medicaid funding for EMS services. By letter of January 16, 1996, DOH informed the City that HHC could continue to receive Medicaid reimbursement for the operating costs of EMS services, and could in turn reimburse the Fire Department for the provision of such services.

Defendants' motion to dismiss is predicated on the theory that the qui tam provisions of the False Claims Act are only available to plaintiffs (unlike the one at bar) who allege violations that had not been publicly disclosed (in civil or administrative hearings, in previous lawsuits, or in the media) prior to the False Claims At complaint. Defendants maintain that because all of the allegations in the complaint at bar were publicly disclosed in a variety of ways prior to the

commencement of this action, no subject matter jurisdiction exists. Plaintiff opposes the motion on the grounds that the information utilized in this action was obtained from non-public sources which plaintiff accessed from his unique vantage point within HHC.

DISCUSSION

A. The False Claims Act and its jurisdictional bar

31 U.S.C. § 3730(e)(4)(A) provides as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Section 3730(e)(4)(B) defines an "original source" as an individual who "has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Under the False Claims Act ("FCA"), individuals are authorized to bring civil actions for violations of the statute on their own behalf as well as for the United States. The *qui tam* action is brought in the name of the government, which may either intervene and prosecute the action, or allow the original plaintiff to proceed by himself. *U.S. ex rel. Kreindler &*

Kreindler v. United Technololzies Corporation (2d Cir. 1993) 985 F.2d 1148, 1153. The Second Circuit has been wary of qui tam plaintiffs due to the omnipresent potential for abuse of the provisions. "Because qui tam plaintiffs ("relators") are entitled to a portion of the proceeds of successful suits, there is the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud." *U. S - ex rel. Doe v. John Doe Corp.* (2d Cir. 1992) 960 F.2d 318, 319.

The satisfaction of § 3730(e)(4) is an issue of subject matter jurisdiction, Kreindler, 985 F.2d at 1157; public disclosure of the allegations upon which the qui tam complaint rests is "the bedrock" of that section's jurisdictional bar. *Doe,* 960 F.2d at 322. Allegations of fraud are publicly disclosed when they are placed in the "public domain." *Id.*

Since the terms "public disclosure" and "public domain" are inherently vague, courts in this circuit have been forced to parse out which types of disclosure satisfy the FCA's jurisdictional bar. In Doe, the relator's action was dismissed because the nature of the fraud at issue had been disclosed to "innocent employees" of defendant John Doe Corp. 960 F.2d at 322. The Doe court also paused to note another case, *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential* Ins. Co. (3 d Cir. 1991) 944 F.2d 1149, in which the FCA's jurisdictional bar was held to be applicable. In *Stinson,* the fraud allegations were taken from court files that had not been kept under seal. That court held that because any diligent member of the public could have gone to court and demanded to see the documents, there was public disclosure. In the words of the Second Circuit in Doe (commenting on *Stinson),* "[p]otential accessibility by those not a party to the fraud was the touchstone of public disclosure." 960 F.2d at 322.

In Kreindler, the defendant argued that discovery material containing all of the information upon which the relator had based its claim was filed with the court in a prior civil litigation. 985 F.2d at 1158. Although the relator itself was barred from disclosing the information by stipulation, the record from the prior case was not sealed. The court in Kreindler determined that, as in Stinson, the information was publicly disclosed because it was available to anyone who wished to consult the court file. *Id.* Kreindler responded that even if the discovery material were publicly disclosed, it had obtained the pertinent information not solely from the discovery material but also through independent investigation. *Id.* The court rejected that argument, holding that the jurisdictional bar applies to a qui tam action based in any part upon publicly disclosed allegations or transactions. *Id.*

In *U.S. ex rel. Mikes v. Straus* (S.D.N.Y. 1996) 931 F. Supp. 248, Judge Conner, after examining the precise wording of the FCA, drew a distinction between public information and allegations based thereon. "Courts sometimes speak loosely of barring a *qui tam* suit because it is based on 'publicly disclosed information.' But the Act bars suits based on publicly disclosed 'allegations or transactions,' not information." *Mikes,* 931 F.Supp. at 254 (quoting *Wang v. FMC Cop2.* (9' Cir. 1992) 975 F.2d 1412, 1418). In Mikes, the relator conceded that the information on which the allegations were based was publicly disclosed. Unlike *Doe* and *Kreindler,* where the relator re-asserted the same allegations that had been asserted in prior actions, Mikes' complaint was not based upon allegations or transactions that were publicly disclosed in a previous suit. Judge Conner, after deeming Mikes "the quintessential whistle-blower whom the drafters of the qui tam provisions of the FCA ... seemed to have envisioned, "opted to let the case go

forward. 931 F.Supp. at 257.

In a case decided subsequent to *Mikes, U.S. ex rel. Pentagen Technologies International Limited v. CACI International Inc., et al.*_(S.D.N.Y. 1997) 1997 VVL 473549, Pentagen opposed a motion to dismiss with the same theory that had successfully been employed by the plaintiff in Mikes. *Judge*_Sweet rejected Pentagen's argument, concluding, in effect, that Pentagen (unlike Mikes) was attempting to create a distinction without a difference:

> Pentagen's argument is unavailing, because the difference between the allegations of this and the prior action amounts to little more than an assertion of non-performance versus an assertion of poor performance. In fact, Pentagen's current claims of non-perfornance could not have been constructed without the use of transactions described in [prior disclosures].
> 1997 WL 473549 at *9.

B. "Original source"

To be an "original source" within the meaning of § 3730(e)(4)(B), a *qui tam* plaintiff must: (1) have direct and independent knowledge of the information on which the allegations are based; and (2) have voluntarily provided such information to the government prior to filing suit. The Second Circuit, after examining the text of the statute as well as its legislative history, has added a third requirement, namely that a plaintiff must also have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based. U.S. ex *rel. Dick v. Long Island Lighting Co.* (2d Cir. 1990) 912 F.2d 13, 16. See also *Gold v. Morrison-Knudsen* Co. (2d Cir. 1995) 68 F.3d 1475, 1477 (to be an "original source"

plaintiff must at least have direct and independent knowledge of fraud); *U.S. ex rel. De Carlo v. Kiewit/AFC Enterprises, Inc.* (S.D.N.Y. 1996) 937 F.Supp. 1039, 1049 (plaintiff deemed an "original source" where he had independent knowledge of defendant's fraudulent conduct, obtaining information and making first-hand observations during the course of his employment).

Plaintiff contends that even if the jurisdictional bar of § 3730(e)(4)(A) is applicable, the complaint should nevertheless survive the motion because he qualifies as an "original source" within the meaning of § 3730(e)(4)(B); defendant argues for the opposite conclusion. We will take up that issue after first determining whether the jurisdictional bar is applicable.

C. Were the allegations or transactions in the complaint previously publicly disclosed?

In painstaking detail, defendants' moving brief, at pages 19-43, dissects the complaint and adduces the previous public disclosures upon which it was based. The disclosures from which the allegations in the complaint were taken were: (1) public hearings, board and agency meetings, and reports; (2) the news media; and (3) plaintiff s heretofore unsuccessful state court complaint and related affidavits.

Plaintiff, apparently conceding that much of the complaint at bar has indeed been based upon his prior state complaint, opposes the motion by crystallizing his allegations. He asserts that the allegations upon which he plans to proceed are based on transactions which occurred after the March 1996 EMS transfer, while the allegations from his state court action dealt with the transfer itself. Plaintiffs affidavit in opposition to the motion cites three instances of alleged fraud which he

insists had not been previously disclosed ("post-transfer allegations of fraud"): (1) defendants have defrauded the federal government by submitting bills for ambulance services without first applying for "new ambulance provider numbers appropriate to the change in ownership of NYC EMS" or new tax identification numbers, *McAllan* Aff. at TT 10, 13; (2) defendant HHC is improperly receiving Medicaid reimbursement funds from the state and federal governments after the March 1996 transfer of emergency medical services despite the fact that HHC is currently unlicensed to provide ambulance services, *McAllan Aff.* at ¶ 13; and (3) HHC has improperly maintained ownership of the EMS ambulance fleet in order to enhance its Medicaid "Rate Base" Reimbursement despite the fact that the agency is unlicensed to operate ambulances, *Id.* In sum, the motion is opposed on the theory that the specific billing practices currently employed by HHC and the fire department, which plaintiff alleges to be fraudulent, could not have been made public before this case was filed.

We dismiss plaintiff s first two post-transfer allegations of fraud because they fail to state a cause of action upon which relief may be granted. Nothing in either of the first two allegations suggests that the government was hurt in any way by the alleged "fraud." Plaintiff does not allege, for example, that had the defendants taken the steps he claims to have been necessary (i.e., obtaining new ambulance provider and tax identification numbers, and procuring a license authorizing HHC to provide ambulance services), the federal government would have paid even one dollar less in reimbursement fees. As such, no damage can be demonstrated and those two allegations must be dismissed.[1]

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[1] Plaintiff s first post-transfer allegation of fraud could also be dismissed on the grounds that it does not appear in the complaint - it was raised for the

Moreover, we agree with defendants' assertion that the three "new" allegations "merely recharacterize, and parse the details of," the allegations and transactions underlying the state court action. In the state court action, plaintiff s claims were summarized by the court as follows: (1) the EMS transfer and Local Law 20 are contrary to the HHC Act in that only HHC can provide ambulance and emergency medical services; (2) the EMS transfer violates the Civil Service Law; (3) the EMS transfer must be submitted to a referendum; (4) the City obtained the ambulance Service certificate by fraud; and (5) the EMS ambulance service fees charged by the FDNY are contrary to GML § 209-b. *McAllan, et al. v. Marcos, et al.*, supra, 5-6.

Plaintiff's first two post-transfer allegations of fraud seize upon insignificant details of the EMS transfer in an attempt to create a distinction without a meaningful difference from plaintiff s state court allegations. Plaintiff already tried, without success, to challenge the legality of the transfer of the Article 30 Certificate to the fire department from HHC. The first two "new" fraud allegations essentially cloak the old challenge in new dress.

Finally, the first two post-transfer allegations of fraud were arguably disclosed when plaintiff sought relief in his state court complaint. Paragraph 90 of plaintiff's amended complaint in the state court action provides, in relevant part:

> Petitioner-Plaintiffs respectfully seek a preliminary/permanent injunction directing that NYC EMS and/or FDNY and/or the City of New York may not charge any fee for providing the emergency

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first time in his affidavit in opposition to the motion to dismiss.

> ambulance service EMS/FDNY currently performs while NYC EMS is an operational part of the New York City Fire Department. The Petitioner-Plaintiffs specifically request that this injunction include any Medicaid, Medicare, out-of-pocket and/or private medical insurance fees and/or any reimbursement allegedly due the New York City Fire Department or the City of New York ... Further, the Petitioner-Plaintiffs respectfully [sic] that NYC HHC be permanently enjoined from billing or imposing charges of any sort on any user of the NYC EMS system on behalf of the New York City Fire Department or the City of New York for as long as NYC EMS remains an operational component of FDNY.

See also id., ¶¶ p,x (seeking declaratory and injunctive relief preventing HHC from billing any entity for emergency medical services provided by the fire department).

As for the third and final post-transfer allegation of fraud (HHC's retention of vehicle ownership), the transaction underlying that allegation was disclosed in at least three separate documents in addition to public hearings. See Calhoun *Aff.*, Exh. C., Exh. I thereto, ¶¶ 14-15; Exh. D ¶ 112; Exh. D., Exh. M thereto.

D. Does plaintiff qualify as an "original source"?

For reasons already set forth above, plaintiff has no "direct and independent knowledge" of the types of fraud he alleges, which is the statute's first requirement. While plaintiff may have learned about the billing practices of EMS subsequent to the transfer as a direct result of his position, such practices could easily have been uncovered from other sources (such as an examination of the final Memorandum of

Understanding regarding the transfer). From the foregoing, it follows that plaintiffs knowledge could not have been independent; therefore, plaintiff cannot be deemed an "original source."

CONCLUSION

For the reasons stated above, plaintiff is barred from bringing suit under the *qui tam* provisions of the FCA. The complaint is dismissed.

SO ORDERED.

May 4, 1999

New York, New York

WHITMAN KNAPP,

SENIOR U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7 day of August two thousand one.

Dkt No: 99-6150

United States

v.

The City of New York

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant RICHARD McALLAN

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE
Clerk

By: s/ Beth J. Meador
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